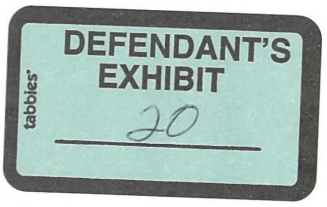
From:	Bryan J Pesta
To:	Michael L Artbauer; Elizabeth A Lehfeldt; Eric S Allard; Debbie K Jackson; Stephanie L Kent; Andrew H Resnick; R E Ingersoll
Cc:	Birch P Browning; Cheryl M Bracken; Laura Bloomberg
Subject:	My reply to the Provost"s letter
Date:	Tuesday, January 25, 2022 7:08:46 PM
Attachments:	Pesta reply 5.docx

Dear all,

Attached is my reply to the Provost's letter.

Sincerely,

Bryan



Reply to the Provost's Decision Letter, 1/25/22

Dear New Committee Members,

How this got to where we are today is frustratingly complicated, and the learning curve for new entrants to understand what happened here is steep. Also, many of the specific issues require their own mini learning curves to understand. The result is approximately 400 pages of documents already contained in my "investigative binder" and elsewhere, for an investigation that's been ongoing since fall of 2019.

More importantly, I still assert I did not do any of this:

> *I [**still**] swear that I did not intentionally, knowingly, or recklessly do **anything** that the committee [**or Provost**] claim I did."*

Please keep an open mind, still. Please note that although my research has created consequences for CSU, for which I deeply regret (especially given my 36 years of presence here; and my children now attending here versus elsewhere, which hopefully illustrates that I care about and respect this school), I didn't engage in the research misconduct I am charged with. Although I am sick over how I soured our relationship with NIH, this still all revolves around my academic freedom, together with several students– external to CSU– attempting to take it away from me. I'm not sure what else I can do here, but offer my sincere apology, and then defend my innocence.

Also, if I have been flippant in past replies, I apologize. I really am trying to navigate this process by using logic rather than emotion, or frustration. I also understand and appreciate CSU's concerns regarding its relationship with NIH. But this investigation's focus must be exclusively on whether I recklessly or intentionally engaged in the conduct alleged, and whether CSU met its burden of proof.

Complexity:

Neither the Provost nor committee has conceded a single point I've made in all my writings. But it's taken me until now to fully realize the key problem. Without a solid appreciation of the many subtleties and complexities of my situation, together with NIH jargon, it's naively (but unfairly) easy to misunderstand what happened. Moreover, I believe that because of this complexity, all my colleagues' well-intentioned misunderstandings have unfairly prejudiced me. Consider a fresh example that I just now noticed:

Dr. Ward created a timeline in the "binder" showing my NIH applications in chronological order. For my fourth application (#24213), he noted in bold: **First to specifically list J. Fuerst as a**

collaborator. This certainly looks bad for me. The strong implication is that I was incompetent by not listing John on my earlier three applications, or I was devious / trying to sneak John by the NIH. Either way, this seems suspicious, especially coming from our VP of Research.

However, NIH counter-intuitively defines "Collaborator" (Section 14, Definitions) as "An individual who is **not** under the direct supervision of the PI (e.g., **not** a member of the PI's laboratory) ..." Thus, John was never an NIH "collaborator" on any of my first three TCP projects, even though we "collaborated" together on two of them. So, despite the strong insinuation against me here, Dr. Ward is provably wrong.

Further illustrating how the complexity of the NIH process and the committee's unfamiliarity complicated things for me, please note there was nonetheless a valid reason for me to list John as an "internal collaborator" (as appears in the binder) on just my fourth application, #24213. Namely, we also sought to add external collaborators for this project. As such, the reporting rules were different, making John an "internal collaborator" here, but not in the first three TCP applications. NIH logic is curious to outsiders, including initially / still to me, which, I argue, hurts me unconscionably.

At any rate, Dr. Ward's indictment is provably wrong, even though I now believe it was made without malice. But I certainly would not expect any committee member to have figured this out. In fact, how could a committee member figure out a detail like this, even if they wanted to investigate Dr. Ward's statement further? This is simply not fair and has put an enormous burden / mental strain on me to defend every specific allegation that exists against me anywhere, spanning several years. This then likely makes me look like someone who is protesting far too much. It also unfairly shifts the burden from the committee to me. It also necessitates me producing very long rebuttals, like the one here (for which I apologize).

CSU Must get its Facts Straight before Sanctioning Me:

The "complexity" issue here is not isolated to Dr. Ward. Another more serious example comes from the Provost:

> You-and not the student co-author-- were the PI and responsible party on this research project, and you were the scholar who wrote this to Teri Kocevar in our research office: **I will be the only one who has access to these data...** [emphasis added]

The Provost's statement is powerful, and understandably has the tendency to sway opinions regarding my culpability. Yet, the Provost is provably wrong here. My email to Ms. Kocevar regarded just application #18007. This was my first ever NIH application, which was on sex differences. John's TCP participation throughout all this was (provably) exclusive to my other

TCP applications. Please note, I did not remember that this was the case when the committee asked me about it (see the Provost's citation of my confusing testimony in her decision letter).

As such, John never touched these data. I know this to be the case, because I never touched these data (the restricted-access side) either. Essentially, I discovered that the imaging files were not preprocessed (and I do not know how to work with raw imaging data), so I scrapped the entire project. Nonetheless, the Provost's insinuation here is diametrically opposed to what actually happened.

Again, though, unless I point this out here, it would be impossible for any committee member to know what really happened. I really think the complexity here severely prejudices me. The complexity and the committee's unfamiliarity with NIH's baroque terminology and reporting rules makes me look deceitful or evasive.

Further, if we expand the Provost's full paragraph (for the part I just cited above), she is **provably wrong on all four insinuations** regarding my academic conduct she makes in that paragraph:

> You-and not the student co-author-- were the PI and responsible party on this research project, and you were the scholar who wrote this to Teri Kocevar in our research office: **[1]** I will be the only one who has access to these data, **[2]** they will be stored on my CSU computer, which is password and firewall protected. **[3]** We know now that this statement did not reflect your ultimate actions. Your subsequent decisions led to your **[4]** failure to protect a controlled access dataset that included information about a most vulnerable population: children

[1] I was always the only person with access here, as my email to Ms. Kocevar was specific to just TCP application #18007 (please see my explanation immediately above). John never touched these data (he ultimately couldn't have, as neither did I).

[2] The data were never stored anywhere, as I didn't access them for this project (the files were too massive). *How is it possible CSU does not know this?* This info is in the very binder (p. 108; closeout of #18007) that *CSU itself created for the investigation against me*. Moreover, if I had accessed these data, CSU is where I would have housed them, at least until I realized my CSU computer was not powerful enough to extract all this. I have alleged this all along.

[3] My statement certainly did reflect my ultimate actions, given [1] and [2] above.

[4] The children (who were actually adults when we accessed their genotypes) could not have been harmed by me here as I didn't store their data anywhere. Again, CSU should have known this before mistakenly using it against me to decide my guilt.

Again, I believe the statements here were made without malice, but out of a fundamental misunderstanding of the data reporting and close-out requirements. Regardless of intent, these incorrect statements from high authority are highly prejudicial.

The complexity inherent in the NIH rules and procedures has subtly shifted the burden from CSU to me, which is obviously not the policy. I implore the new committee to look into all this more deeply, as surface-level perceptions have gotten me in serious trouble. As such, I waive whatever time limit exists for the new committee to make its decision here. In fact, I implore you to take your time.

The above-described errors by high-level central administrators are grievous, especially considering the legitimate authority granted them by their job titles. This is especially true given what is at stake here, and what precedent would be set by firing me. In fact, I believe these errors alone, by their prejudicial nature, should be enough to dismiss this case.

In sum, surely, CSU must get its "facts" right before entering the judgment and punishment phases of their thinking (or especially before revoking one's tenure)? As the saying goes, the administration is "entitled to its opinions, but not its facts."

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To the extent that I may have come across as not expressing an appropriate level of remorse over all this, I again apologize if I have appeared flippant. However, I first need a clear understanding of what I presumably did. I argue here that such an understanding is still yet to be determined on several key issues. Moreover, I show that the Provost clearly and unambiguously contradicted university policy in formulating her conclusions.

From the Beginning:

The impetus for the investigation involves mostly students (external to CSU) sending a complaint letter to NIH. The students (Bird et al.) knew John and I prior, as they are vocal opponents of our research in this area (conducted independently by us at that time). In fact, Bird et al. raised fully 21 separate issues to the NIH regarding our Lasker et al. (2019) paper, while characterizing our research as being the "racist application of genetic data" (i.e., an academic freedom issue; though, I hope academic freedom trumps whether students external to CSU find my research to be offensive and / or racist).

Of these 21 points, NIH deemed five to be worthy of further inquiry, and they sent us notice of this on 9/19/19. I immediately replied in detail to their inquiry on 9/20/19. The NIH didn't follow up on my reply until May 27, 2021[1], despite them soliciting it from me in the first place.

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[1] The NIH's lackadaisical approach to email replies has created much of the controversy and confusion surrounding my case.

Moreover, the NIH continued to approve our subsequent data access renewals and new application requests from us made over at least the next year. Given this, I don't see how anyone can conclude that I knew, from September of 2019 until May of 2021, that these alleged data-access issues still existed.

In the meantime, Bird et al. also sent their complaint letter to CSU. CSU subsequently sent their own (more open-ended) inquiry to me, to which I then replied (letter to Ward, December 17, 2020). It was not until May 27, 2021, however, that Dr. Michael Lauer, NIH Deputy Director for Extramural Research, finally sent the "notification of violation of the Data Use Certification agreement" ("UPDATE: Data Management Incident"). Again, this represented the first time NIH followed up with me on the data management incident in 1.5 years. This alone is both prejudicial and absurd. Please note:

IF my NIH issues were so critical to NIH, why did they wait more than 18 months to reply to my email, solicited directly from them? Why didn't they revoke my data access immediately back in 2019 (versus approve further access!)? And why did it take CSU making a formal inquiry to get them to reply at all?

However, and surprisingly, in the May 2021 email, Dr. Lauer did not raise any issue regarding the use of the imputation server for the Lasker et al. paper (instead he generated new issues). Here Dr. Lauer focused on a preprint, which had been posted online for a while (Pesta B. "Intelligence-associated Polygenic Scores Predict g…). In doing so, he at least tacitly acknowledged that NIH had already conducted an inquiry of Lasker et al. and had nothing to contradict our original explanations for how we handled the data here. As an aside, the May 2021 email was also the first time NIH raised our use of the external imputation server as an "issue under investigation" (for the preprint). This is despite NIH having reviewed this issue with respect to Lasker et al. back in the fall of 2019.[2]

Next, during the investigation, I began to worry that the committee did not fully understand many of the arguments regarding the various allegations against me. Moreover, the members did not follow up with NIH on key points that would clarify the gravity of the charges (despite being tasked to do exactly this, and despite my repeated requests for this to be done). For example, in response to my clarifications about the external server, the committee included the following statement in their final report:

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[2]Another curiosity is that Dr. Lauer did not complain that I also used the Michigan Imputation Server (for both Lasker et al. and the preprint) without specifying this in the RUS. Presumably, this is because use of this server is both common *and* not specified in researchers RUSs. This highlights the inconsistency of NIH's policy and enforcement.

> On 10-11-21. Dr. Pesta's repeated defense that NIH would have authorized the use of this outside source because authors of another study report using the same service is based on flawed logic and does not excuse his failure to report these intentions to NIH before the data were uploaded.

The extent of their logical analyses of my detailed argument was just that it was "based on flawed logic." But the committee provided no explanation of how the logic was flawed. How can I rebut their argument without knowing what it is? Certainly, this analysis is deficient toward concluding my clear and convincing guilt. This analysis is also deficient toward firing a full tenured professor.

In short, the committee simply dismissed my concerns, and did not follow up with the NIH regarding the precise nature of the error (i.e., whether the issue was just a failure to report use of the server in my RUS, versus whether I used an imputation server that the NIH would never have approved). This is despite the committee being explicitly charged with determining the seriousness of violations (see below).

A sincere desire in me still exists to understand and appropriately rectify any violations that exist here. I appreciate the pressure NIH is likely putting on CSU. Yet all the issues I have with the committee's report were compounded by the Provost's statement. I believe the statement unwittingly violates, in several places, university's policies and procedures. I review the Technical / Legal issues behind my assertion in detail below. From this, it is clear that (among other things, and by the Provost's own admission), the investigation committee has not met the basic requirements for proving academic misconduct on my part. Moreover, the Provost failed to follow CSU policy by not basing her determinations and recommended sanctions exclusively on just the actionable information contained in the committee's final report.

CSU's Research Misconduct Policy: Legal / Technical Issues

1. ***The only issues on which a decision can be based legally are claimed findings of research misconduct in the "Research Misconduct Investigation Final Report." All additional claims by the Provost, or anyone else, are irrelevant.***

As the Provost stated, the issue concerns sections 3344-28-06(K)(5) and 3344-28-10 of the CSU Research Misconduct Policy. Moreover, our university's guidelines clearly state that "*Based on the findings* presented in the final investigation report, the deciding official shall determine whether misconduct has occurred, and what sanctions or administrative actions are to be undertaken." [Emphasis added.]

Hence, all other assertions, outside the committee's findings, are irrelevant to my culpability and / or any potential sanctions against me.

2. ***The committee was charged with finding "clear and convincing evidence" of academic misconduct. All additional claims and "other concerns" by the committee are irrelevant for the present purposes.***

In line with University policy, the committee was instructed as follows: "The purpose of the investigation is to evaluate the evidence and testimony of the respondent, the complainants, and key witnesses to determine whether there is *clear and convincing evidence that academic research misconduct occurred and, if so, to what extent, who was responsible, and its seriousness*" (Ward, July 26, 2021).

Thus, while the committee added "areas of concern" in their report, these are not evidence of "research misconduct." This is why the committee appropriately separated allegations of academic misconduct here from "areas of concern" in their final report. That is, these are two separate categories, only the former of which is relevant to whether I committed academic misconduct.

3. ***"Research misconduct" has a precise meaning.***

According to Rule 3344-28-02 of the Ohio Administrative Code:

> Academic research misconduct," herein, sometimes referred to as "misconduct," means fabrication, falsification, plagiarism, undisclosed conflicts of interest as defined in the policy for managing conflict of interest, or other practices that seriously deviate from those that are commonly accepted within the academic community for proposing, conducting, or reporting research. It does not include honest error or honest differences in interpretations or judgments of data.

This definition corresponds with the U.S. Public Health Service's (PHS) definition. Regarding this:

a. *Research misconduct has a limited scope.*

The Office of Research Integrity (ORI) clarifies:

> What types of misconduct are covered by this policy? *This policy is limited to addressing misconduct related to the conduct and reporting of research, as distinct from misconduct that occurs in the research setting but that does not affect the integrity of the research record, such as misallocation of funds, sexual harassment, and discrimination.* This policy does not limit agencies or research institutions from addressing these other issues under appropriate policies, rules, regulations, or laws. In addition, should the behavior associated with research misconduct also trigger the applicability of other laws (including criminal law) this policy is not intended to limit agencies or research institutions from pursuing these matters under separate authorities." [Emphasis added]. https://ori.hhs.gov/federal-research-misconduct-policy

That is, research misconduct is limited just to misconduct that *affects the integrity of the research record,* where "integrity of the research record" means:

> The research record is the record of data or results that embody the facts resulting from scientific inquiry, and includes, but is not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles. https://ori.hhs.gov/federal-research-misconduct-policy

Research misconduct does not include misconduct, done in the research setting, that does not affect the integrity of the research record. Ardale and Baghele (2020) provided an example, highly relevant to my investigation:

> Research misconduct has a precise meaning in federal regulations. ***Noncompliance with*** *policies and procedures for the protection of human research subjects, although reportable to* ***an Institutional Review Board (IRB), is not considered to be research misconduct under the federal definition***. [Emphasis added twice]

Obviously, the federal definition of research misconduct specifically excludes alleged IRB violations (see, also, Bierer & Barnes, 2014). This by itself should resolve the IRB charge against me, but I suspect it won't, as given my experience here so far, what I just wrote will be ignored (hence my prior frustration).

b. *Research misconduct explicitly excludes honest errors.*

c. *A finding of research misconduct requires the showing of intent to commit misconduct.*

The ORI states:

> Under the policy, three elements must be met in order to establish a finding of research misconduct. One of these elements is a showing that the subject had the requisite level of intent to commit the misconduct. The intent element is satisfied by showing that the misconduct was committed ``intentionally, or knowingly, or recklessly.'' Only one of these needs to be demonstrated in order to satisfy this element of a research misconduct finding.

To be clear, "knowingly" means more than just being "consciously aware." Instead, it involves "realizing that the behavior was wrong, but doing it anyway." Moreover, while ORI does not define "recklessly," according to the American Law Institute's Model Penal Code (1985), "recklessness" occurs "when the accused acts in conscious disregard of a high probability that her conduct is culpable." This is different from negligence or carelessness. In line with this

distinction, case law with respect to research misconduct cases under the PHS definition draws a distinction between reckless (intentional) and negligent behavior[3].

> d. *Research misconduct involves "fabrication, falsification, plagiarism, undisclosed conflicts of interest as defined in the policy for managing conflict of interest, or other practices that seriously deviate from those that are commonly accepted within the academic community".*

where "practices that seriously deviate" is tantamount to "seriously unethical practices" (Buzzelli, 1999). Note also I believe the original committee was confused by the meaning of the term, "seriously deviates." The term clearly covers more than just "rarely happens."

4. By the provost's own admission, the basic requirement for research misconduct is not met in this case.

The Provost is charged to "determine whether misconduct has occurred" based on "the findings presented in just the committee's final investigation report." The Provost states:

> In arriving at this conclusion, I considered carefully your own testimony to the committee. In some parts of your testimony, I note that you acknowledge committing the violation. *I do not know if these violations were committed knowingly or recklessly. I do not distinguish between these two states of mind in interpreting the actions of a tenured full professor who should be well informed about appropriate research practices prior to seeking to serve as a Principal Investigator on a research project...I conclude that you have acted with either willful dishonesty or an unacceptable level of incompetence in your scholarship.* [Italics added]

The Provost cannot determine if "these violations were committed knowingly or recklessly." She claims it does not matter since "a tenured full professor should be well informed about appropriate research practices..." She concludes that the acts were done with either "willful dishonesty" or "an unacceptable level of incompetence."

However, not being "well informed about appropriate research practices" and showing "an unacceptable level of incompetence" (even if true here) is not the same as acting "intentionally, or knowingly, or recklessly." The former simply does not entail intent to commit violations. Thus, by the Provost's own concession, the necessary requirement for academic misconduct – showing that the actions were committed intentionally, or knowingly, or recklessly – has simply not been met.

5. The Committee's Final Report failed to identify valid instances of research misconduct.

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[3] See e.g., Kulynych, J. (1998)

> The original committee claimed to identify four instances of research misconduct:
>
> **1**. Unauthorized use of NIH controlled access data from the database of Genotypes and Phenotypes (dbGaP); **2**. Publishing research findings despite NIH explicitly stating that you and your colleagues did not have the approval to do so; **3**. Failure to receive IRB approval for use of NIH data that went beyond what was outlined in a Data Use Certification (DUC) Agreement; and **4**. Unauthorized research funding for Cleveland State University (CSU)-related research efforts without CSU approval.

Working backward, the third and the fourth allegations clearly fall outside the scope of academic research misconduct, as defined above. They concern alleged misconduct that does not affect "the integrity of the research record." As for the fourth, it is also notable that the committee apparently conflates "uncommon practices" with "seriously deviates" (i.e., "seriously unethical practices," as defined above). Additionally, as I've argued elsewhere, the third charge is logically incoherent (and is not even academic misconduct per federal regulations, as clearly shown above).

Also, as for the third allegation, it would have been impossible to secure IRB approval and NIH approval in the way the committee claims. Worse, doing so could arguably represent *actual* unethical behavior on my part. Again, NIH would never approve a research proposal which explicitly proposes to violate an NIH DUC. Likewise, NIH would never approve a data access request based on an IRB which explicitly proposes to violate NIH's DUC. The only IRB-approved proposal that the NIH would also approve is one that did not violate NIH's DUC. But NIH explicitly does not require an IRB for use of these data. On the point of ethics, submitting an IRB which explicitly proposed to violate the NIH's DUC agreement seems seriously unethical. Yet in my read, that's what the committee implied I should have done. In sum, the whole IRB argument by the committee is frankly absurd on multiple levels.

The second charge (i.e., publishing without NIH permission) is based on several false perceptions the committee had regarding what happened here. To wit, the committee stated:

> Dr. Pesta violated the agreement with NIH by publishing a research manuscript ... using dbGap data without permission. Co-author, J. Fuerst asked NIH for publication permission on 2-4-20 which was denied on 2-5-20.

The committee misapplies a statement by Dr. Parsian, from the NIH, who said "According to NIH rules pre- and post- doctoral students are not qualified to access dbGaP data sets. You can NOT use that particular data set for your research due to restriction."

But Dr. Parsian was flatly wrong on this point, as the NIH conceded in August of 2021 Because John was a research assistant of mine, he had legitimate access to the data, under my supervision. NIH states:

> As the DUC states, "the Requester agrees that if access is approved, the PI named in the DAR and those named in the 'Senior/Key Person Profile' section of the DAR and any trainee, employee, or contractor working on the proposed research project under the direct oversight of these individuals, shall become Approved Users of the requested dataset(s)" and are expected to abide by the terms laid out in the DUC agreement.

Regardless, nowhere did Dr. Parsian mandate that our completed manuscripts could not be published (he was instead talking about permission for us to use restricted data to conduct new analyses). As late as last summer, John notified NIH that he still had papers, post analyses that he sought to get published. This yielded no reply from NIH, and this is still true as of today. Thus, the committee's misperception here has no basis in the NIH's actual statements or in the contractual agreement I had with them.

Regarding the first academic misconduct charge (i.e., unauthorized data use), the committee stated:

> Dr. Pesta violated the NIH DUC agreement (#19090, see Attachment 16) by using the dbGaP data to examine "intellectual ability" of subgroups of the U.S. population (see Lasker, Pesta, Fuerst, & Kirkegaard, 2019, "Global ancestry and cognitive ability," Psych, 1, 431-459) when the description of the research that Dr. Pesta submitted (and NIH approved) suggested that he would examine mental health outcomes. By doing so, Dr. Pesta violated the DUC agreement with NIH for use of the dataset, which seriously deviates from common research practice, and was done, at worst knowingly, and at best recklessly.

Again, as I explained to the committee, I had multiple applications for the same data, one of which explicitly covered intelligence research. Thus, the committee's statement "Dr. Pesta violated the DUC agreement with NIH for use of the dataset" is false. I've made this point repeatedly throughout the investigation (and even to the NIH back in 2019), but no one is willing to address the argument. Would the new committee be willing to address this? Or could anyone please:

> explain how #19747 is <u>not</u> an application for <u>TCP data</u> which clearly features <u>intelligence</u> as the variable of interest?

More specifically, the claim by NIH (August 2021) was that I improperly reported Lasker et al. (2019) in the closeout for application #19090, which was about mental health outcomes. As an aside, *why would I report a paper to NIH (on <u>any</u> of my applications) if I were trying to hide that paper from NIH!?*

However, the closeout of #19090 asked the PI to report all relevant research done with TCP data. It is notable that we explained in our reply to NIH in the fall of 2019 that we felt that Lasker, et

al. (2019) was covered by both (#19090 & #19747). NIH did not correct us at the time and continued to renew (#19090 & #19747), giving the clear impression that NIH accepted our sensible reasoning, since intelligence is strongly associated with mental health (e.g., consider the whole field of cognitive epidemiology; https://www.sciencedirect.com/science/article/abs/pii/S0160289609000622). Reporting this project was therefore due diligence. But at the very worst, reporting Lasker et al. in the #19090 closeout was an honest mistake, ironically due merely to me trying to comply with NIH reporting requirements.

As for uploading to the external imputation server, which concerns my only potentially substantive error, the committee states:

> Dr. Pesta violated the non-transferability terms with the NIH DUC agreement for dbgap project (#19090 & # 19747 see Attachment 17) by uploading controlled data or derivatives of controlled data in the form of "coded" Single Nucleotide Polymorphisms (SNPs) to an unapproved foreign online forensic DNA phenotypic service. The uploading of these controlled data or derivatives seriously deviate from common research practices and was done knowingly.

I did admit to uploading controlled data to an imputation server without specifying that I would in the research application (i.e., "without prior approval"). The committee claims that this "seriously deviates from common research practices" (i.e., "was seriously unethical," though I believe they misunderstand the term here) and that the uploading "was done knowingly".

I most certainly knew I was uploading data at the time I was uploading it. However, the relevant issue – and what the committee was charged with showing but does not – is whether I knew I was violating the NIH DUC when uploading the data. It is telling that the committee elides this obvious distinction (between knowing I was uploading data and knowing I was uploading data in violation of the DUC), even though it was pointed out to them in my reply to their initial draft report. As I had noted above and extensively documented, there is overwhelming evidence that I did not intend to violate the DUC agreement here. Again, this is another example of my arguments being ignored so far. Would the new committee be willing to address this?

Next is whether uploading these data represented serious negligence on my part (I believe the committee confuses this issue with the one I raised in the prior paragraph). Since other prominent researchers have used this exact imputation server for the same purposes as mine, it seems likely that NIH would have actually approved our use of this server as well (e.g., given they approved the research topic listed in #19747, how could they not also have approved use of the external server?). But I don't know for sure. The NIH, however, refused to clarify this[4] for us, precluding

[4] It is not entirely surprising that NIH is reluctant to clarify the issues since very prominent researchers also used the same server for the same purposes (without, apparently, reporting it in their RUS). Indeed, in his August 2021 reply, Dr. Lauer walked back his charge to: "You do not dispute that you used this service, that it required you to share

an evaluation of the seriousness of the issue (i.e., whether we simply made a clerical error by not reporting an imputation server that NIH would ultimately have approved, or if uploading was a more serious error that NIH would never have approved).

Regardless, on this issue, the committee disregards their charge which was explicitly to evaluate whether there is clear and convincing evidence that academic research misconduct occurred and, if so, to what extent, who was responsible, *and its seriousness*" (Ward, July 26, 2021). [Emphasis added].

6. The Provost contravenes university policy by basing her determinations and sanctions on concerns other than the four academic research misconduct allegations in the committee's report.

As the Provost stated, the relevant matter is "pursuant to sections 3344-28-06(K)(5) and 3344-28-10 of the Research Misconduct Policy." The Policy clearly states, sanctions will be based on findings of research misconduct "presented in the final investigation report."

The Provost, however, notes:

> Based on the research actions identified in this investigatory report and your rationale for them, *your academically negligent relationship with your student co-author, your failure to disclose your financial relationship with the Human Phenome Diversity Foundation* that both supported equipment for your CSU-affiliated research and that your student co-author (a foundation which both you and the student direct), I conclude that you have acted with either willful dishonesty or an unacceptable level of incompetence in your scholarship. [Italics added.]

However, the committee's final report did not include "your academically negligent relationship with your student co-author" and, perhaps even, "your failure to disclose your financial relationship with the Human Phenome Diversity Foundation"[5] as one of its four allegations of

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data with an unauthorized entity, or that you did not disclose this use to NIH. Use of such a service should have been disclosed to NIH so that NIH could evaluate whether its use was appropriate." (i.e., that I neglected to report this in the RUS).

[5]When discussing failure to "disclose," the provost refers to the CSU Conflict of Interest Policy: "I believe any reasonable professor would realize that your conflation of your position as a tenured full professor at CSU with your role as a "custodian" of a non-profit organization whose funds supported your research projects as well as Uber rides for your student (and co 50lc3 custodian) to your home constituted a real or perceived violation of our CSU Conflict of Interest Policy and should, at a minimum, have been disclosed for additional review." This corresponds to the "ongoing concern" raised by the committee, not to Charge Four. This is clear from the Provost's specific wording: "research actions identified in this investigatory report *and* … your failure to disclose your financial relationship with the Human Phenome Diversity Foundation…" [Italics added.] The provost refers to the actions identified [i.e., the four charges] "and" other concerns.

academic misconduct. Rather, something similar to these are listed in the "ongoing concerns" section, which is described as "areas of concern that are *beyond the scope of this Committee but may need further review*". [Italics added.]

The Provost's determinations and sanctions are thus founded, in part, on concerns that are not alleged academic research misconduct according to the committee report. This clearly violates our school policy.

7. The Provost's sanctions are not commensurate with the actual alleged research misconduct.

The CSU-AAUP Collective Bargaining Agreement clearly states that "the Chief Academic Officer shall take into consideration the principle of progressive discipline." The Provost justifies not using progressive discipline here by stating:

> Given the seriousness of this research misconduct case and the fact that the harm extends beyond your personal reputation to taint the reputation of CSU as a whole, I find the offense warrants the most serious sanction be administered and that any lesser sanction would be disproportionate to the gravity of your conduct.

Regarding reputation issues, it makes me sick that this might be the case, but shouldn't we also determine whether reputations were tainted based on accurate assessments of what happened here, or because people think my work and myself are racist? Neither the Provost nor the Research VP, despite having detailed knowledge of my case, has even accurately assessed what happened here (see the "Complexity" section above). How easy might it be for others to make similar perceptual mistakes?

Moreover, recall the content of the actual committee charges (i.e., using direct quotes from the final report):

> Charge 1a. "violated the NIH DUC agreement (#19090, see Attachment 16) by using the dbGaP data to examine "intellectual ability" of subgroups of the U.S. population … when the description of the research that Dr. Pesta submitted (and NIH approved) suggests that he would examine mental health outcomes."

Reply: Our research on intellectual ability was clearly covered under TCP application #19747. The burden is on CSU to show otherwise, clearly and convincingly. This takes at least some analysis of my arguments here, rather than just merely concluding I am guilty, "because we say so."

> Charge 1b. "violated the non-transferability terms with the NIH DUC agreement for dbgap project (#19090 & # 19747 see Attachment 17) by uploading controlled data or derivatives of controlled data in the form of "coded" Single Nucleotide Polymorphisms (SNPs) to an unapproved foreign online forensic DNA phenotypic service"

Reply: Beyond there being zero evidence of my intent to violate NIH's DUC here, the committee itself dismissed the question of seriousness, noting that my concern on this issue was irrelevant. Thus, the committee, and by extension the Provost, knows that the seriousness of this admitted error is still currently undetermined.

> Charge 2. "violated the agreement with NIH by publishing a research manuscript…"

Reply: There was no such agreement. And despite being repeatedly asked, NIH *never* said that "publishing a research manuscript" (versus further analyzing restricted data) was against its policy. If I am wrong here, please show otherwise.

> Charge 3. "...not applying for University IRB approval for any data use that's outside of granted permissions."

Reply: This falls outside the scope of academic research misconduct, especially given the federal regulation / definition cited above. Additionally, we didn't know that some people would ultimately conclude, years after our paper was published, that IRB was required here.

> Charge 4. "using funding from a personal 501(c)(3) for research purposes, including publishing, with his CSU affiliation, without CSU's permission or knowledge"

Reply: This falls outside the scope of academic research misconduct since it does not affect the integrity of the research record. As for other forms of misconduct, the Committee only notes, "It is common research practice for funds that support University research efforts as employees do so though SRPS". Obviously, however, what is uncommon is not necessarily also "seriously unethical." Again, it seems like the committee conflated terms.

Given the above, is the Provost's (likely unprecedented) beeline to the most serious sanction justified? I believe the NIH wants me out, so CSU wants me out. Whether my speculation is true or false, CSU has simply not met its burden here. Note finally, I concede that some reasonable people might find my research to be objectionable. But this should trigger an assessment that balances my right to academic freedom with others' rights to not be offended. Moreover, I guess it's obvious that I personally would pick academic freedom rights every time.

Miscellaneous:

The Provost raised several additional concerns that do not fall under academic research misconduct (or were not identified as one of the committee's four charges). Examples include:

John's Access to the Data

I covered most of this above, but since the issue is so central to my case, I provide more information here. Different DUCs involve different security plans. For example, my latest application was for AddHealth DbGap. For this I gave a different security protocol relative to that reported in my sex differences application. So, my DUC for any single application was not the same as that for any other. John only accessed the data he was allowed to, and that data was stored on a home computer, approved for use by both CSU and NIH (as shown in the Binder).

Next, after CSU instructed me to destroy the data, I destroyed the data. John protested this, noting that the DUC did not actually require this, at this time, but nonetheless I still destroyed the data. John's argument, which he pointed out to both NIH and CSU, was that destroying the data would force him into violation with the NIMH contract, which requires one to create "data projects" shortly after papers are published.

I admit though that I misread John's CSU transcript in Campus net– thinking he had earned a degree here, as it said he has earned (or transferred in) 177 undergrad and 12 grad credits at CSU. But, I do admit to being wrong here. At any rate, prior, he had taken both grad and undergrad classes at CSU. Moreover, he has published here under the guidance of CSU faculty members. He also received recommendation letters from CSU professors for various graduate programs. As such, I had every reason to trust his integrity and ability regarding research.

I'm also not sure what the Provost means by "failure to protect a controlled access dataset." As I had pointed out, we had destroyed the Trajectories of Complex Phenotype data over a year before NIH's May 2021 report (and I never redownloaded it, since we never went through with the planned external collaboration Scarr-Rowe project). And then I destroyed the ABCD data in the summer of 2021. As for any other issues, as far as I am aware, NIH has not followed up with John on this, or replied to any of his inquiries regarding the charges on these allegations.

The HPDF

No one has yet cited a rule, regulation, or policy number, etc., that I may have violated because of our 501(c)(3). How can you fire me in part because of this? The monies the HPDF received were from private people (who also have free speech / freedom of association rights) who made legitimate donations to a legitimate 501(c)(3).

Moreover, I never had any intent to hide money here from CSU, in fact, I was surprised this whole issue even appeared in the "investigative binder" when I first received it. It never occurred to me that this was a conflict of interest (this is perhaps ignorance on my part, but not intentional recklessness). But I am indeed willing to hear the explanation for how I am wrong here, and to even reimburse (my own fund?) if it is determined I took even de minimis money

inappropriately. Regarding this, I have not "robbed the fund's coffers." I personally received business lunches, and the very temporary use of a computer that the fund bought, for itself, just to support its mission. This computer is older than even this investigation and has not been used since I reformatted the hard drive in the summer of 2021, in fact it's sitting in my basement now.

Similarly, I am simply not a public servant as defined by Ohio ethics law. Professors are specifically exempt. It took me a five-minute Google search to figure this out, yet the original committee was fine with suggesting I was / am in violation of ethics law.

Related, the original committee accused me of "Unauthorized Research Funding." I invite the new committee members to Google this phrase with the quotations included. The result is: No results found for **"unauthorized research funding."** I think I am being sanctioned, partly, for "violating" something that doesn't yet exist as a construct in the English language (let alone a policy at CSU). [At any rate, John is relocating the HPDF to North Carolina, and I am resigning from it at this time]. Thus:

For the last two points I've raised above, CSU is sanctioning me (partly) because of an issue where I haven't even violated any known policy (the HPDF), and because of an issue where the committee literally makes up the policy (Unauthorized Research Funding).

Academic Freedom. My case is still about academic freedom. Consider the initial complaints (from external people who do not know me or have any connection to CSU) that triggered this whole CSU investigation. These were objections about my "racist applications of genetic data (Bird et al., p. 3.37);" and how my research topic might "stigmatize people (Taylor, 7.32)," and how my work is "clearly outside what [I] should be doing (Taylor, 10.177)." Please also see the FIRE documents in my "binder" for an informed legal discussion of how academic freedom trumps things like someone else finding one's research to be offensive, *or even racist*.

Further, regarding academic freedom, the committee's report literally lectured me on how my research is per se unethical, and how a psychologist should know better than to treat "race" as anything but a social construct (yet my contrasts between "social" and "biogeographical" race were the central point of the Lasker et al. paper). The lecture here was longer in terms of word count than any of the "analyses" the committee presented for any of the four academic misconduct charges against me. Ironically, immediately after this, the committee then claimed that despite the comments here, their investigation is not about academic freedom. It seems easier to deny violating academic freedom issues than it is to strive to protect them.

THE FREEDOM to decide whom to collaborate with on one's research is an integral part of academic freedom. By definition then, the committee's whole section criticizing my association with both John and Emil squarely violates my academic freedom.

Please Address My Arguments? As mentioned above, CSU is ignoring my requests to specifically address my arguments on several issues that are central to this investigation. Examples (not mentioned already above) include CSU ignoring (1) my explanation for why / how we reported the Lasker et al. publication to NIH, (2) how I am accused of "improperly" storing restricted-access data on a home computer, when the NIH was clearly ok with this (as noted in CSU's binder– i.e., the evidence they use against me), and (3) how the committee– or frankly anyone– would think that I manipulated the website, ResearchGate, to imply that Emil Kirkegaard is associated with CSU, as if presumably we needed to do this to further advance our racist agendas (I believe this is a conspiracy theory).

Conclusion:

In sum, I believe my reply here has shown the following: (1) Stakeholder misperceptions of what happened here are screwing me, (2) the investigative committee did not fulfill its mission, as they improperly evaluated the charges of academic misconduct against me, (3) they also did not address any of the concerns I raised about the coherence of their arguments, (4) as the Provost herself admitted, the basic elements of academic misconduct have not been met; no one has shown that any errors (if there even were errors) were done either knowingly, intentionally, or recklessly. (5) the Provost also failed to base her decision and recommendations only on the committee's specific determinations versus any "other concerns," and finally (6) a wide disparity exists between the Provost's recommended sanction, and what the committee's four charges could even justify regarding any sanctions.

Moreover, without trying to aggrandize my situation, the new committee's decision here could set an historic and chilling precedent for academics and universities– literally– across America. Shouldn't CSU ought to get its facts right first?

I deeply regret that these incidents have happened, and that CSU has been forced to devote so many resources to investigate all this (and mostly that I severely soured our relationship with NIH). I admit I have created quite the shit show for CSU Central Admin, and I am sincerely sick over this. But again, please consider whether these external consequences stem from what I actually did versus a seriously mistaken impression about what I might have done, under the guise of me being some terrible racist.

In sum, I believe I have created, step by step above, compelling explanations for why I am innocent, certainly on all actionable charges against me here. I suspect this comes across as a bold statement, but where is there any (accurate) clear, convincing evidence of my intent to commit academic misconduct here?

Who among the 80 will stand up for the 20?

Sincerely,

Bryan

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